

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re

Determination of Royalty Rates and Terms
for Transmission of Sound Recordings by
Satellite Radio and “Preexisting”
Subscription Services (SDARS III)

Docket No. 16–CRB–0001–SR/PSSR

(2018–2022) (Remand)

**DECLARATION OF ANDREW B. CHERRY IN RESPONSE TO THE JUDGES’
SEPTEMBER 2, 2021 ORDER GRANTING IN PART AND DENYING IN PART
MUSIC CHOICE’S MOTION TO COMPEL AFTER FURTHER BRIEFING
(On behalf of SoundExchange)**

1. I am an attorney at Jenner & Block LLP and counsel for SoundExchange, Inc. in Docket No. 16-CRB-0001-SR/PSSR (2018-2022) (Remand). I am authorized to submit this declaration on behalf of SoundExchange in response to the Judges’ September 2, 2021 Order Granting in Part and Denying in Part Music Choice’s Motion to Compel After Further Briefing (“September 2 Order”). I am familiar with the facts set forth in this declaration, and if called upon to testify could do so truthfully and competently.

2. The September 2 Order directed SoundExchange to file a supplemental declaration addressing two questions concerning Item #7, the document identified as CNTRL00003776, Notes from Prager Metis’ review of BDO work papers in connection with the two audits BDO conducted with respect to the PSS royalty statements rendered for the annual periods 2014, 2015, & 2016.

3. First, the Judges ordered SoundExchange to file a declaration “setting forth, if known, the date on which Item #7 was prepared by the auditors at Prager Metis.” September 2

Order at 8. As described further below, the metadata for Item #7 specifies that it was created and last modified on October 13, 2017. The file name further confirms that date of preparation.

4. Second, the Judges ordered SoundExchange to file a declaration “stating that the declarant has in fact compared all three documents (Item #7 and the attachments to Items #5 and 6, respectively) and that they are the same in all respects, including the inclusion or absence of handwritten notations.” *Id.* As described further below, Item #7 *is* the attachment to Item #6, and I have compared Item #7 with the attachment to Item #5, and they are duplicate files that are the same in all respects, including the absence of handwritten notations.

5. In February and March 2021, documents were collected from SoundExchange as part of the discovery conducted during this remand proceeding. In March 2021, the collected documents were transmitted to an e-discovery vendor retained by SoundExchange and uploaded into a workspace on the Relativity platform. This process preserved the documents in the identical form in which they were collected, and also preserved the original metadata associated with each document.

6. In the Relativity platform, emails and the documents attached to those emails are given consecutive control numbers and listed as being part of the same document “family.” The email identified as Item #6 has a control number in the Relativity database of CNTRL00003775. The attachment to the email identified as Item #6 has a control number in the Relativity database of CNTRL00003776. Item #7 has a control number in Relativity of CNTRL00003776. Items #6 and #7 are listed as being part of the same document “family” in Relativity. Thus, what are referred to in the September 2 Order as Item #7 and as the attachment to Item #6 are in fact the same file.

7. To assess whether Item #7, which is the attachment to the email identified as Item #6, is the same as the attachment to the email identified as Item #5, I downloaded from Relativity the native Microsoft Word version of each document and compared them both side-by-side and with the “Compare” function of Microsoft Word. In this comparison, I found the text of Item #7 and the attachment to Item #5 to be identical. Because they are electronic documents, neither has any handwritten notes. I also compared the metadata for Item #7, which is the attachment to the email identified as Item #6, with the metadata for the attachment to Item #5. The metadata for the two files is the same:

- a. The file description is “Microsoft 2007 Word Document.”
- b. The file extension is “.docx.”
- c. The Title and File Name is “SE-MC BDO Status Report 10-13-17.docx.”
- d. The document type is identified as being an “Attachment.”
- e. The author is “aleka.” No last name is identified.
- f. The date and time the document was last modified is identified as 5:19:00 PM on 10/13/2017.
- g. The date and time each document was created is identified 4:12:00 PM on 10/13/2017.
- h. The MD5 hash is identified as “98e79866fbb2fb839dc00587b68fc2c5.”

8. The MD5 hash is a set of letters and numbers that identifies a document. The e-discovery vendor generates this hash value by applying a standard algorithm to the document text and metadata. If the same file is attached to different emails sent at different times to different people, the MD5 hash value will still be the same for the attached document, as is the case here.

9. Pursuant to 28 U.S.C. § 1747, I hereby declare under penalty of perjury under the laws of the United States that, to the best of my knowledge, information, and belief, the foregoing is true and correct.

[signature block on following page]

Dated: September 8, 2021
Washington, D.C.

Respectfully Submitted,


Andrew B. Cherry

Proof of Delivery

I hereby certify that on Wednesday, September 08, 2021, I provided a true and correct copy of the Declaration of Andrew B. Cherry in Response to the Judges' September 2, 2021 Order Granting in Part and Denying in Part Music Choice's Motion to Compel After Further Briefing (on Behalf of Soundexchange) to the following:

SAG-AFTRA, represented by Steven R. Englund, served via ESERVICE at
senglund@jenner.com

American Association of Independent Music ("A2IM"), represented by Steven R. Englund,
served via ESERVICE at senglund@jenner.com

Johnson, George, represented by George D Johnson, served via ESERVICE at
george@georgejohnson.com

Sony Music Entertainment, represented by Steven R. Englund, served via ESERVICE at
senglund@jenner.com

Universal Music Group, represented by Steven R. Englund, served via ESERVICE at
senglund@jenner.com

Recording Industry Association of America, represented by Steven R. Englund, served via
ESERVICE at senglund@jenner.com

Music Choice, represented by Paul M Fakler, served via ESERVICE at pfakler@orrick.com

American Federation of Musicians of the United States and Canada, represented by Steven
R. Englund, served via ESERVICE at senglund@jenner.com

Warner Music Group, represented by Steven R. Englund, served via ESERVICE at
senglund@jenner.com

Sirius XM, represented by Todd Larson, served via ESERVICE at todd.larson@weil.com

Signed: /s/ Steven R. Englund